In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 19

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON C. JORN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

This case was argued and submitted to this Court during the 1969 Term, and was restored to the Calendar for reargument this Term. As to the issues on the merits, raised in our Jurisdictional Statement and argued to the Court last Term, we continue to rely upon our submission of last Term. Although the Court has noted probable jurisdiction in this case, we submit this supplemental brief, in light of *United States* v. *Sisson*, No. 305, O.T. 1969, decided June 29, 1970.

The facts in the present case which are relevant to this Court's jurisdiction may be briefly recounted.

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After a jury had been impaneled and sworn, the district court, either in response to a defense request or on its own motion, discharged the jury before the trial was complete. The government then sought to reprosecute, and, in advance of the second trial, the defendant moved for dismissal of the prosecution on the ground of double jeopardy. The district court granted that motion, and the government noted this appeal, under the Criminal Appeals Act, 18 U.S.C. 3731—particularly the provision which entitles the government to a direct appeal to this Court "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Under this provision (and its predecessor), this Court has entertained government appeals from the dismissal of prosecutions on double jeopardy grounds as a matter of course, *United States* v. *Tateo*, 377 U.S. 463, 465, and despite jurisdictional challenge, *United States* v. *Oppenheimer*, 242 U.S. 85, 86.[1] Indeed, while there has been dispute among the members of the Court regarding the precise scope of the concept of "motion in bar," *e.g.*, *United States* v. *Mersky*, 361 U.S. 431, 441, 453; *United States* v. *Blue*, 384 U.S. 251, 254, there appears to be general agreement that a motion to dismiss on double jeopardy grounds is archetypal. Section 3731's predecessor referred to a

[1] Oppenheimer's unsuccessful challenge to this Court's jurisdiction was based principally on the ground that the government's right to appeal under the statute was limited to cases questioning the validity or construction of statutes. See Motion to Dismiss and Brief for Appellee, No. 412, O.T. 1916. See, also, *Sisson*, slip op., p. 38, n. 63.

"special plea in bar," and among the most prominent forms of such a plea were the pleas of *autrefois convict* and *autrefois acquit—i.e.*, the plea of double jeopardy. See *Mersky, supra,* 361 U.S. at 457 (Mr. Justice Stewart, dissenting); *Sisson, supra,* at n. 53.

Nothing in *Sisson* is inconsistent with the settled interpretation of Section 3731's applicability to double jeopardy pleas reflected in the *Oppenheimer* and *Tateo* decisions. In *Sisson* the government acknowledged, and this Court held, that the statutory language "when the defendant has not been put in jeopardy" limits the government's right to appeal under the motion-in-bar provision "to situations in which a jury has not been empaneled * * *" (slip op., pp. 34, 35). Obviously, however, neither the Court nor the government was there addressing the situation where one jury had been sworn, then discharged (or its verdict vacated) under circumstances arguably permitting a second trial, and the government then sought to appeal from a pre-trial ruling of the second court.[2]

The government's position is that in such a case, in which the second jury has not yet been empaneled, the government has the same right to appeal under Section 3731 as it would have in identical circum-

[2] Indeed, with *Tateo* and *Oppenheimer* on the books and the present case pending at the time the argument in *Sisson* was heard, there would have been no other reasonable explanation for the government's submission in *Sisson* (quoted at slip op. 37) that it had *always* adhered to the position "that the statute barred appeals from the granting of motions in bar after jeopardy had attached" and "has never sought to appeal in these circumstances."

stances in a case in which there had been no prior proceedings involving another jury—since the appeal from the pre-trial ruling of the second court would not interrupt the prior proceedings and would not be an attempt to review any determinations made in those proceedings.[3] It could conceivably be argued that the Court's discussion in *Sisson* of the motion in bar provision raises some doubt about the correctness of that interpretation of Section 3731 in cases in which the government seeks to appeal from a pre-trial ruling of the second court which is made in response to the renewal of a motion which had also been presented to the first court or which otherwise is based on considerations that were equally relevant to the prior proceedings. We do not believe, however, that any such doubt extends to cases like the present one, in which the plea of double jeopardy was a motion in bar of the trial before the second jury only and presented no question relevant to the validity of the prior proceedings. We perceive nothing in the reasoning of *Sisson* which calls for reconsideration

[3] In terms of the statutory language, our position is that the proviso "when the defendant has not been put in jeopardy" refers to "jeopardy" in the second trial whenever the pre-trial ruling from which the government seeks to appeal was made in the second trial.

of the rule established in *Tateo* and *Oppenheimer* for this narrow category of cases.

Respectfully submitted.

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